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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of § 73.202(b)) RM -
Table of Allotments,)
FM Broadcast Stations)
Milledgeville, Georgia)

To: Chief, Policy and Rules Division
Mass Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

Preston W. Small, by his attorney, hereby files an opposition to Radio Perry Inc.'s (Radio Perry) August 30, 1993 Petition for Reconsideration (Petition). In support thereof, the following is respectfully submitted:

1) Radio Perry filed its Petition to seek reconsideration of an August 17, 1993 letter from Michael C. Ruger, Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau (Allocations Branch), to Eric S. Kravitz, counsel to Radio Perry (Reply Ref. 1800D5) which dismissed Radio Perry's March 30, 1993 Petition for Rule Making. Radio Perry filed the rule making petition for the purpose of downgrading Mr. Small's Station WLRR(FM) from Channel 264C3 to Channel 264A. Radio Perry claimed that this downgrading would allow Radio Perry's Station WPGA-FM to increase its power to 6 kilowatts.

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2) Mr. Small was granted an upgrade of his station from Channel 264A to Channel 264C3 by Report and Order in MM Docket No. 89-547, released on June 28, 1991 (6 FCC Rcd 3753). On June 4, 1993, the Audio Services Division of the Mass Media Bureau wrote to Mr. Small and advised him that he had 30 days to file a construction permit application for Class C3 facilities and that failure to do so may result in the downgrading of WLRR(FM). Mr. Small timely filed a construction permit application and the application was accepted for filing.¹

3) The Allocations Branch's August 17, 1993 letter correctly notes that there is nothing in the Commission's Rules which mandates an automatic downgrading under circumstances presented instantly. Moreover, Mr. Small submitted two extension of time requests which sought to extend the FCC Form 301 filing deadline.²

¹ We wish to clarify a minor matter referenced in the Allocations Branch's August 17, 1993 letter. The Allocations Branch noted that Mr. Small's filing deadline was July 4, 1993, and that Mr. Small submitted his application on July 6, 1993. We note that July 4, 1993 was a Sunday and July 5, 1993 was a Federal holiday. Thus, July 6 was the filing deadline. §1.4(j) of the Commission's Rules. Moreover, Mr. Small's attorney sent the application via Federal Express from his office in Washington, D.C. to the Mellon lock box in Pittsburgh on Friday, July 2, 1993. Hence, the application was filed in a timely fashion.

² In footnote 1 of its Petition, Radio Perry proposed a test for enforcement of the 90-day deadline set forth in the Report and Order, wherein the deadline "need not be rigidly enforced if the delay is small or the result of involuntary factors." (Emphasis added.) Mr. Small filed
(continued...)

Therefore, allowing Mr. Small a 30 day window in which to file a construction permit application for an upgrade which the Commission had already determined was in the public interest was a justifiable, and reasonable, procedure.³

4) The Allocations Branch correctly explained that Mr. Small's July 6 application filing demonstrated his continued interest in the Class C3 channel. Hence, the Allocations Branch

²(...continued)

two extension requests indicating that he could not locate a suitable site for his upgraded station. Even if the test Radio Perry proposes could be applied instantly, the lack of an available site, an involuntary factor, would cause Mr. Small to pass Radio Perry's test. Radio Perry's failure to discuss Mr. Small's extension requests is peculiar.

³ Radio Perry claims at page 3 of its Petition that the Allocations Branch erred in its August 17, 1993 letter by indicating that Radio Perry violated §1.401(d) by failing to serve Mr. Small with a copy of Radio Perry's Petition For Rule Making. Radio Perry claims that by serving Mr. Small's attorney, it had complied with the requirement to serve the affected "licensee." Generally, §1.47(d) requires service upon a party or, if represented by counsel in a proceeding, upon counsel. However, in view of the fact that a request to change the allocation of an existing station could be an extremely important matter, §1.401(d) provides a special service rule which requires service directly upon the affected "licensee." It is noted that §1.401(d) does not indicate that "service is to be made pursuant to §1.47(d)." Even if Mr. Small could be considered a party to a proceeding at the time Radio Perry filed its Petition for Rule Making, §1.401(d), read in conjunction with §1.47(d), requires service upon the licensee and counsel to ensure licensee knowledge of the filing.

rightly concluded that there was no need to implement a rule making proceeding to decide this issue.

5) It is appropriate at this time to clarify various factual misstatements which are made in Radio Perry's March 30, 1993 Petition for Rule Making. First, footnote 1 of Radio Perry's March 30, 1993 Petition for Rule Making states that Radio Perry's August 23, 1989 rule making request to upgrade its Station WPGA, Perry, Georgia was filed "in light of an earlier petition by WLRR(FM) which proposed the relocation of the WLRR(FM) site." Mr. Small filed his initial rule making request on September 29, 1989 and proposed relocation of the upgraded facility on January 26, 1990. Thus, Radio Perry is factually incorrect; Radio Perry did not initially file in response to Mr. Small's filing. See MM Docket No. 89-547.

6) Second, Footnote 1 of Radio Perry's March 30, 1993 Petition for Rule Making incorrectly states that "Radio Perry . . . withdrew its Petition [for upgrade] after Small retracted his own proposal to relocate WLRR(FM)'s transmitter site" As noted above, on January 26, 1990 Mr. Small filed to relocate the upgraded facility proposed in his September 29, 1989 Petition for Rule Making. On February 12, 1990 Mr. Small withdrew his January 26, 1990 filing and indicated that he wished to prosecute his proposal as originally filed, a proposal which the Commission subsequently approved. Radio Perry's upgrade request was withdrawn via letter

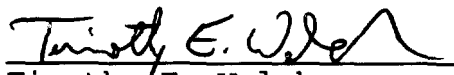
dated November 16, 1989, well before Mr. Small's February 12, 1990 filing. Given these dates, Radio Perry's withdrawal could not have been predicated upon a "retraction" by Mr. Small.

7) Radio Perry should explain why it is attempting to distort the history of Docket No. 89-547 in the instant proceeding.⁴ If Radio Perry does not provide an adequate explanation, the Commission should investigate a) whether Radio Perry has intentionally misrepresented facts to the Commission and b) whether Radio Perry is attempting to delay Mr. Small's upgrade through frivolous, factually incorrect pleadings.

WHEREFORE, in view of the foregoing, it is respectfully submitted that the Allocations Branch correctly dismissed Radio Perry's Petition for Rule Making pursuant to §1.401 of the Rules and it is respectfully requested that Radio Perry's Petition For Reconsideration be denied.

Respectfully submitted,
PRESTON W. SMALL

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September 13, 1993


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His Attorney

⁴ It is noted that Radio Perry made similar misstatements in its July 23, 1993 Petition to Dismiss Mr. Small's upgrade application bearing File No. BPH-930706IE.

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of September, 1993 supervised the mailing of the foregoing OPPOSITION TO PETITION FOR RECONSIDERATION by first class United States mail, postage prepaid, to the following:

Eric S. Kravetz, Esq.
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